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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,
Petitioners

versus

ANTONIOS LATSIS,
Respondent

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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Longshore and Harbor Workers' Compensation Act, 33
U.S.C. §901 et seq., specifically 33 U.S.C. §902(3)

MISCELLANEOUS:

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QUESTION PRESENTED

What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a Jones Act "seaman" under 46 U.S.C. §688?

STATEMENT OF INTEREST

The question left open in McDermott International, Inc. v. Wilander[1] and now before this Court — namely, the nature and extent of the employment-related connexity to a vessel required for "seaman" status under the Jones Act — is of vital interest to amici curiae and to the entire maritime industry.

TECO Transport & Trade Corporation is engaged in the water transportation, storage, terminalling, and transfer of coal and other bulk commodities through its four subsidiaries, Gulfcoast Transit Company, Mid-South Towing Company, Electro-Coal Transfer Corporation, and GC Service Company, Inc. Gulfcoast Transit Company owns and operates a fleet of U.S. flag ocean-going tugs and barges. Mid-South Towing Company owns and operates a fleet of inland river towboats and barges, and operates a barge fleeting facility on the Ohio River. Electro-Coal Transfer Corporation operates the nation's second largest coal storage and transloading terminal on the Mississippi River, and is engaged in the loading, offloading, and transferring of bulk commodities to and from inland river barges, ocean-going barges, and ocean-going ships. GC Service Company,

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[1] 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991)

Inc. provides stevedoring and longshoring services for Gulfcoast Transit's vessels, and performs maintenance and repair services on those vessels at the request of Gulfcoast Transit.

TECO Transport & Trade Corporation and its subsidiaries employ a variety of workers, some of whom are employed as Jones Act "seamen" aboard company owned and operated vessels, and others of whom are employed as "harbor workers" assigned to load, offload and on occasion repair and maintain those vessels. On occasion, this latter group of employees assert claims under the Jones Act, notwithstanding their "employee" status under the LHWCA, on the theory that they are "more or less permanently assigned to or substantially connected to an identifiable fleet of vessels."[2] Litigants and courts continually find themselves confronting the problem of alleged "seaman" status because there is a lack of a clear and comprehensive definition of the term "seaman."[3]

The broad test of "seaman" status advanced by the Second Circuit in Latsis v. Chandris, Inc.[4] is disturbing to amici curiae in that their traditional "harbor worker" employees, whom Congress intended to be covered by the LHWCA, may be found

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[2] See, e.g., Campo v. Electro-Coal Transfer Corp., 955 F.2d 10 (5th Cir. 1990), cert. granted and vacated, 112 S.Ct. 858, 116 L.Ed. 2d 766 (1992), on remand, 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed. 2d 978 (1988); Murray v. Gulfcoast Transit Co., 529 So.2d 784 (Fla.App. 2d Dist. 1988).

[3] Allbritton, "Seaman Status in Wilander's Wake," 68 Tul. L.Rev. 373 (1994).

[4] 20 F.3d 45 (2d Cir. 1994)

to be "seamen" under that test, although those employees have been held not to be Jones Act seamen under the Fifth Circuit's Robison test.[5] The Second Circuit's test results in a confusing jury instruction because it relies on a "more or less" standard and because it does not allow for the negative inference that the claimant also may not be a seaman but instead a LHWCA "employee."

Unlike the litigants in the case at bar, the TECO companies are in a position to view the legal ramifications of the question presented in a much broader and different perspective, since they actually employ both "seamen" and "harbor workers" in the conduct of their business operations. The Court's decision to the question here presented will have a broader application than to the limited factual situation presented in this case, and will directly impact the TECO companies in the conduct of their business operations, regardless of whether the Court upholds the Latsis test, the Robison test, or even creates a new test for determining seaman status. Accordingly, the TECO companies show they are vitally concerned in the question presented by this case.[6]

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[5] Compare Latsis v. Chandris, Inc. with Campo v. Electro-Coal transfer Corp., 955 F.2d 10 (5th Cir. 1990), cert. granted and vacated, 112 S.Ct. 858, 116 L.Ed. 2d 766 (1992), on remand, 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993).

[6] Amici Curiae have obtained the consent of both petitioner and respondent to file this brief, per the correspondence already on file with the Clerk of Court.

SUMMARY OF THE ARGUMENT

The Court needs to create a comprehensive legal test for determining "seaman" status under the Jones Act. The broad test employed by the Second Circuit in Latsis v. Chandris, Inc. is completely contrary to this Court's pronouncements in McDermott International, Inc. v. Wilander, and therefore should be rejected.

Amici curiae suggest the following test as more in keeping with Wilander's pronouncements:

> A maritime worker is a "seaman" under the Jones Act, if the worker can establish —
>
> 1. The worker is permanently assigned to a vessel* that is in navigation or otherwise has a substantial employment connection to that vessel.
>
> 2. The work performed contributes to the function of the vessel or to the accomplishment of its mission.
>
> 3. The worker's assignment to the vessel and the worker's contribution to the vessel exposes the worker to perils peculiar to the sea.

*(or an identifiable group of vessels, acting together or under one control)

However, any test adopted by this Court should provide for a jury instruction that allows the jury to consider a non-seaman's status as well. Otherwise, the "sea-based workers versus land-based workers" dichotomy inherent in the Jones Act and LHWCA becomes meaningless.

ARGUMENT

What are the distinguishing characteristics that make one maritime worker a seaman and another a harbor worker? That is the question presented in this case and left unresolved and unanswered in McDermott International, Inc. v. Wilander[7]. A clear and precise answer will furnish everyone with the ingredients necessary to determine who will be entitled to Jones Act benefits and who will be a harbor worker.

The legal tests presently in use are unsatisfactory and are violative of Wilander, as demonstrated throughout this brief. Amici curiae offer a new test:

> A maritime worker is a "seaman" under the Jones Act, if the worker can establish —
>
> 1. The worker is permanently assigned to a vessel* that is in navigation or otherwise has a substantial employment connection to that vessel.
>
> 2. The work performed contributes to the function of the vessel or to the accomplishment of its mission.
>
> 3. The worker's assignment to the vessel and the worker's contribution to the vessel exposes the worker to perils peculiar to the sea.

*(or identifiable group of vessels acting together or under one control)

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[7] 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991)

This legal test maintains the "sea-based workers versus land-based workers" dichotomy inherent in both the Jones Act and the LHWCA, and is consistent with the legal test for "employee" under the LHWCA[8].

In formulating the definition for Jones Act "seaman" status, this Court is asked to resolve the conflict between the test presently used by the Fifth Circuit Court of Appeal as set forth in Offshore Co. v. Robison[9], and the test employed by the Second Circuit Court of Appeal in the case at bar. The Robison test and the Latsis test are both used in terms of when the status issue should be submitted to the jury, and both tests are utilized in the actual instruction to the jury. The inherent problem with both tests is that they are not articulated in terms of what should be told to the jury so that they can decide who is and who is not a "seaman."[10] The Fifth Circuit's Robison test provides:

> There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission,

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[8] 33 U.S.C. §902(3). See Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977).

[9] 266 F.2d 769 (5th Cir. 1959)

[10] The jury is never told the worker can be a LHWCA "employee." See 33 U.S.C. §902(3).

> or to the operation or welfare of the vessel in terms of its maintenance during its movement or doing anchorage for its future trips.[11]

The Second Circuit's Latsis test provides:

> [Jones Act status requires] ". . . a more or less permanent connection with a vessel . . ."
>
> . . . .
>
> The test [of seaman status] will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea. Latsis v. Chandris Inc. 20 F.3d at 57.[12]

The Robison test requires: (1) the maritime worker must be permanently assigned to a vessel in navigation or perform a substantial part of his work on the vessel; and (2) the worker must contribute to the function of the vessel or the accomplishment of

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[11] Offshore Co. v. Robison, 266 F.2d at 779. The second part of the Robison test was expressly approved in Wilander.

[12] Latsis v. Chandris Inc., 20 F.3d at 57.

its mission.[13] The first part of Robison is at issue here, and is stated in the disjunctive and is formulated in terms of the worker being either "permanently assigned" to a vessel or "performing a substantial portion of his work" on the vessel. This portion of the Robison test allows the putative seaman two ways of meeting his status — he can qualify either by fulfilling the "permanent assignment" requirement or fulfilling the "substantial work equivalent" requirement. Wilander did not discuss Robison's "substantial work" alternative. It is the "substantial work performed on a vessel" requirement that preoccupies most of the cases, and in order to satisfy this requirement, the Fifth Circuit requires the claimant to show that he performed a significant part of his work aboard the vessel "with at least some degree of regularity and continuity" and "in the context of his entire employment" with his current employer.[14]

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[13] Accord, Barrett v. Chevron USA, Inc., 781 F.2d 1067 (5th Cir. 1986). Barrett refines Robison to allow the worker to establish his work relationship to "an identifiable group of vessels acting together or under one control." Barrett, 781 F.2d at 1074.

[14] Barrett v. Chevron USA, Inc., 781 F.2d 1067, 1073-74 (5th Cir. 1986). Robison's "substantial part of his work" requirement is designed to exclude from Jones Act coverage those who are only randomly assigned to a vessel or whose presence aboard a vessel is of a transitory or sporadic nature. Campo v. Electro-Coal Transfer Corp., 970 F.2d 51, 53 (5th Cir. 1992), cert. denied, 113 S.Ct. 1261 (1993); Barrett v. Chevron USA, Inc., 781 F.2d 1067, 1074 (5th Cir. 1986). Unfortunately, by failing to equally consider both the amount of time spent aboard the vessel and the nature of the work being performed aboard the vessel in determining what is "substantial," the Robison test fails in its purpose. See Allbritton, "Seaman Status in Wilander's Wake," 68 Tul.L.Rev. 373 (1994).

The Latsis test requires the maritime worker to establish: (1) that he contributed to the function of the vessel or to the accomplishment of its mission, (2) that his contribution was limited to a particular vessel or identifiable group of vessels, (3) that his contribution was substantial in terms of its duration or nature, and (4) he was regularly exposed to the perils of the sea. The third and fourth elements comprise the Second Circuit's general requirement that the worker must show "a more or less permanent connection to a vessel." The third and fourth parts of the Latsis test are formulated in terms of the worker being "more or less permanently connected" with the vessel, and the worker meets this standard by showing that his contribution to the vessel was substantial either in terms of its duration or in its nature.

Robison speaks in terms of "permanent assignment" and "substantial performance," while Latsis is more expansive and speaks in generalized terms of "a more or less permanent connection." The distinction is not a matter of mere semantics, since even the Second Circuit acknowledges that the plaintiff in the case at bar would not constitute a Jones Act seaman if the Robison test were applied.[15] However, both tests are deficient since both tests fail to instruct the jury that the worker can also be a LHWCA "employee."

I. Wilander's guidance and requirements for formulating a legal test

In Wilander, the Court held that one need not aid in the navigation of the vessel in order to qualify as a Jones Act seaman.

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[15] The Second Circuit overturned a jury verdict, based on the district court's Robison test jury instruction, that the plaintiff was not a Jones Act seaman. See Latsis v. Chandris, Inc., 20 F.3d at 52 & 54.

The Court's holding was a narrow one, since the Court was only asked to consider whether Jones Act seaman status required the worker's duties be "in aid of navigation" of a vessel. The Court in Wilander was not asked to fashion a comprehensive standard for Jones Act status, nor did the Court attempt to do so.

However, in rejecting the "aid to navigation" requirement, the Court stated that the term "seaman" was defined solely in terms of the employee's connection to a vessel in navigation, and that a necessary element of that connection was that the employee perform "the work of the vessel," that is, that the employee's duties contribute to the function of the vessel or to the accomplishment of its mission.

Although expressly refusing to define a comprehensive "status" definition, the Court in Wilander nevertheless did set forth certain parameters to provide guidance to the federal and state courts for the formulation of the legal standard:

> "... the Jones Act and the LHWCA are mutually exclusive."[16]
>
> "'Master or member of a crew' [in the LHWCA] is a refinement of the term 'seaman' in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act.... the key requirement for Jones Act coverage now appears in another statute [LHWCA]."[17]

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[16] 498 U.S. at 347, 111 S.Ct. at 813, 112 L.Ed. 2d at 877.

[17] 498 U.S. at 347, 111 S.Ct. at 813, 112 L.Ed. 2d at 877.

"With the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seaman."[18]

". . . Seamen do not include land-based workers."[19]

"... 'master or member of a crew' [in LHWCA] restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee."[20]

"We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees.[21]

"Traditional seaman's remedies . . . have been 'universally recognized as . . . growing ot of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards

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[18] 498 U.S. at 347, 111 S.Ct. at 813, 112 L.Ed. 2d at 877.

[19] 498 U.S. at 348, 111 S.Ct. at 814, 112 L.Ed. 2d at 878.

[20] 498 U.S. at 348, 111 S.Ct. at 814, 112 L.Ed. 2d at 878.

[21] 498 U.S. at 353, 111 S.Ct. at 817, 112 L.Ed. 2d at 881.

and disadvantages to which they who go down to the sea in ships are subjected. It is this distinction that Congress recognized in the LHWCA and the Jones Act.'"[22]

". . . all those with that 'peculiar relationship to the vessel' are covered under the Jones Act, regardless of the particular job they perform."[23]

"We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation.[24]

"All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed."[25]

"It is not the employee's particular job that is determinative, but the employee's connection to a vessel."[26]

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[22] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[23] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[24] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[25] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[26] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

> "The key to seaman status is employment-related connection to a vessel in navigation. . . . we hold that a necessary element of the connection is that a seaman perform the work of a vessel."[27]
>
> "There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise."[28]
>
> ". . . a seaman must be doing the ship's work."[29]

In Wilander, the Court recognized and reaffirmed the mutual exclusivity between the Jones Act and the LHWCA, yet at the same time, the Court found the phrase "member of a crew of any vessel" used in the LHWCA to be synonymous with the term "seaman" used in the Jones Act. However, notwithstanding the mutual exclusivity of the two statutes, the Court in Southwest Marine, Inc. v. Gizoni[30] held that a maritime "employee" under the LHWCA could nevertheless qualify as a "seaman" under the Jones Act, where there was an evidentiary basis that the worker had the requisite connection to a vessel required for Jones Act seaman status, regardless of the fact that the worker's employment function was enumerated in the LHWCA. In Gizoni, the Court held that the worker's status could not be determined as a matter of law simply because the worker's occupation was specifically

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[27] 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[28] 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882, quoting Maryland Cas. Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938).

[29] 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[30] 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed. 2d 405 (1991).

enumerated in the LHWCA, if there was an evidentiary basis that the worker had an employment connection to a vessel. Although the Court did not formulate a test for "seaman" status nor expand further its discussion in Wilander, the Court reemphasized its pronouncements in Wilander that Jones Act seaman status required an "employment-related connection to a vessel in navigation."[31]

Wilander (and Gizoni) requires that any test for Jones Act status must recognize and maintain the "sea-based worker/land-based worker" distinction inherent in the respective coverages of the Jones Act and LHWCA. Any proposed test which cannot maintain this distinction, while at the same time focusing on the nature and duration of the worker's employment connection to a vessel, will be unsatisfactory.

II. The Second Circuit's Latsis test is contrary to Wilander

Despite the Second Circuit's attempt to follow Wilander, the Latsis test falls far short of constituting the appropriate standard for determining seaman status. The Second Circuit's "more or less permanent connection with a vessel" is insufficient to meet Wilander's standards. In fact, as the Second Circuit's application of its test in Latsis v. Chandris readily demonstrates, the Second Circuit's test is much broader than what Wilander requires and allows harbor workers to become seamen simply on the basis of job description and work on a vessel.

The weakness of the Second Circuit's test is realized in that court's application of the test to the Latsis facts. The Court found Latsis "was connected to a vessel in navigation" because

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[31] 112 S.Ct. at 492, 116 L.Ed. 2d at 415.

he was "doing the ship's work" at the time of his injury, namely acting as a supervising engineer on board the vessel.[32] The Second Circuit's conclusion that Latsis qualified as a "seaman" represents a fundamental lack of understanding on the part of that court as to the nature of the work performed on ships by the ship's master and crew and the work performed on ships by the shipowner's managerial employees, independent contractors and specialists, and reflects a fundamental misunderstanding as to Latsis' employment function and his relationship to the vessel — hence, the short- coming of the Second Circuit's test.

Although officially characterized as a "supervising engineer," Latsis was nothing more than a "port engineer," a low level managerial employee whose job it is on behalf of the owner to periodically go aboard company-owned vessels to ensure that company practices and procedures regarding maintenance and repair are followed on board the ship and to provide office liaison with the vessels in connection with required maintenance and repair. Clearly, Latsis was a shoreside worker assigned to occasionally go aboard his employer's vessels. The Second Circuit simply considered whether this activity constituted "substantial connection to a vessel," without regard to whether it was "ship's work" or "owner's work." Latsis's time on the vessel was transitory and sporadic, depending solely on the occurrence of some maintenance and repair problem aboard ship requiring his shoreside expertise and presence.[33]

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[32] 20 F.3d at 52.

[33] The fallacy in the Second Circuit's test is also reflected in the fact that, in explaining the parameters of its test, the Second Circuit admonished the district court to instruct the jury to consider the amount of time Latsis was on board a vessel while the vessel was in dry dock, notwithstanding that the vessel would be "out of navigation" during its dry dock period.

The Second Circuit's requirement of a "more or less" permanent connection allows the putative worker to have something less than a permanent connection to become a Jones Act seaman, despite Wilander's requirement that the worker have a "definite and permanent connection with a vessel."[34] The use of the words "more or less" weakens the legal standard and even defeats the test, since those words allow the claimant to have a relationship with the vessel that is "less" than the requisite connection. The words "more or less" confuses the jury in their application of the test. The worker either has a "definite and permanent connection with a vessel" or he does not; if he does, he is a Jones Act seaman, but if he does not, then he is not a Jones Act seaman.

The Second Circuit's test allows the fact finder to consider either the employee's duration aboard the vessel or the nature of the employee's work aboard the vessel in order to determine whether the putative worker has the necessary "more or less substantial connection with a vessel" for Jones Act purposes. The test should require the fact finder to consider both the duration of the employee's connection with the vessel and the nature of that connection. By allowing the fact finder to consider either feature instead of both features, the Latsis test blurs the "sea-based workers/land-based workers" distinction inherent in the Jones Act and LHWCA and allows LHWCA "harbor workers" to become Jones Act "seamen" simply on the basis that the nature of their work allows them to be on board a vessel at the time of

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[34] Wilander, 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882, quoting Maryland Cas. Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938).

injury. This is of particular concern to amici curiae, whose "Pizzitolo/Gizoni" workers[35] have been found to constitute "harbor workers" and not "seamen" under the Fifth Circuit's Robison test.[36] Application of the Latsis test would leave the status of the TECO employees in doubt, notwithstanding the clear intention that they be "harbor workers" and "seamen."

The Latsis test fails to consider the requisite "employment connexity" in the context of the "employment function" being rendered the vessel. For example, some vessel maintenance functions of necessity must be done by "harbor workers" and "repairmen" while the vessel is in dry dock, while other vessel maintenance functions can be and are performed by "seamen" during the course of a sea voyage. The former maintenance function must be considered "shoreside," since while in dry dock the vessel is out of navigation, while the latter maintenance function must of necessity be considered "ship's work." The distinguishing characteristics between the two maintenance functions is that the former is performed by shoreside individuals whose work temporarily necessitates their being on a vessel, whereas the latter involves employees whose "allegiance to the ship" require them to maintain the ship on a daily routine. Amici curiae submit that the Second Circuit's Latsis test would allow both workers to be Jones Act seamen, yet only the latter worker would be considered a seaman under the dictates of Wilander.

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[35] Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), overruled, Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed. 2d 405 (1991). See Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993).

[36] Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993).

Finally, the Latsis test does not preserve the distinction between "sea-based" workers and "land-based" workers inherent in the Jones Act and the LHWCA and recognized in Wilander, since the Second Circuit's jury charge does not instruct the jury that the claimant might fall within the scope of the LHWCA rather than the Jones Act. The claimant's status under the LHWCA is certainly relevant in the jury's determination whether or not the claimant is a Jones Act seaman. Therefore, the Latsis test is contrary to Wilander's requirements.

III. A new test for determining seaman status

Experience in many status jury trials has shown that the "sea-based workers versus land-based workers" distinction recognized by Wilander is meaningless unless the jury is advised of this distinction. Any jury instruction that is framed from the Court's test of "seaman" status must inform the jury that the alternative to "seaman" status is "employee" status under the LHWCA, so that a claimant may be a "harbor worker" under the LHWCA instead of a "seaman" under the Jones Act. Otherwise, the jury is left with the improper impression that the claimant must either be a Jones Act seaman or else the claimant is not entitled to any recovery of benefits, which is simply not true. Therefore, in order to provide all parties with their constitutional rights under the Seventh Amendment of the Constitution and to maintain the distinction between "sea-based" workers and "land-based" workers inherent in the Jones Act and in the LHWCA, this Court must not only frame a clear and comprehensive definition of the term "seaman," this Court must also frame a jury instruction which advises of a claimant's alternative status. It is, after all, the

jury — trier of fact — that applies the legal standard to the facts before them.[37]

Latsis and Robison are both too broad in light of Wilander. Wilander recognizes that the Jones Act and the LHWCA create a "sea-based workers/land-based workers" distinction, and Wilander requires that any Jones Act test preserve that distinction. Amci curiae offer a new test:

> A maritime worker is a "seaman" under the Jones Act, if the worker can establish —
>
> 1. The worker is permanently assigned to a vessel* that is in navigation or otherwise has a substantial employment connection to that vessel.
>
> 2. The work performed contributes to the function of the vessel or to the accomplishment of its mission.
>
> 3. The worker's assignment to the vessel and the worker's contribution to the vessel exposes the worker to perils peculiar to the sea.

*(or identifiable group of vessels acting together or under one control)

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[37] Wilander, 498 U.S. at 356, 111 S.Ct. at 880, 112 L.Ed. 2d at 883.

This legal test maintains the "sea-based versus land-based workers" dichotomy inherent in both the Jones Act and the LHWCA.

In maintaining this distinction, there is no reason to give one statute's "status" requirement a broader interpretation than the other. In Northeast Marine Terminal Co. v. Caputo,[38] this Court gave term "employee" as used in the LHWCA a broad and liberal interpretation in keeping with the LHWCA's purpose of extending coverage to a wide variety of maritime workers. In Wilander, this Court gave the term "seaman" as used in the Jones Act an expansive and liberal construction in keeping with the Jones Act's purpose of protecting sea-based maritime workers. Although in Wilander this Court recognized the "mutual exclusivity" of the coverage afforded by the Jones Act and the LHWCA, previously this Court has held that the Jones Act and LHWCA are to be read in pari materia with each other.[39]

Amici curiae's test recognizes that the maritime worker either falls within the scope of the Jones Act or within the scope of the LHWCA, and so amici curiae's test preserves the "sea-based workers versus land-based workers" distinction inherent in the Jones Act and the LHWCA, and at the same time, maintains the mutual exclusivity of the two statutes.[40] The "sea-

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[38] 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977).

[39] Warner v. Goltra, 293 U.S. 155, 159, 55 S.Ct. 46, 48, 79 L.Ed. 254, 258 (1934).

[40] The only exception is that of the "passenger" or "invitee" aboard a vessel, who is neither a seaman nor a harbor worker, and so is not protected under either the Jones Act or the LHWCA. See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed. 2d 550 (1959).

based versus land-based workers" distinction can be maintained only if the status requirements of the Jones Act and the LHWCA are given equal consideration, and then only if the jury is informed that the alternative to Jones Act "status" is LHWCA "status."

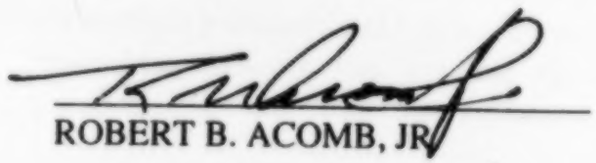
The test suggested by amici curiae will better provide the fact finder with a definition that those intended by Congress to be seamen will be found to be seamen and those intended to be harbor workers will be found to be harbor workers, in that those doing "ship's work" will be seaman and those doing "shore-based work" albeit aboard a vessel will not be found to be seamen. The test suggested by amici curiae ensures that those who really do suffer the perils peculiar to those who go to the sea will be protected by the Jones Act, while those who are exposed to a broader range of perils will be protected by the LHWCA.

CONCLUSION

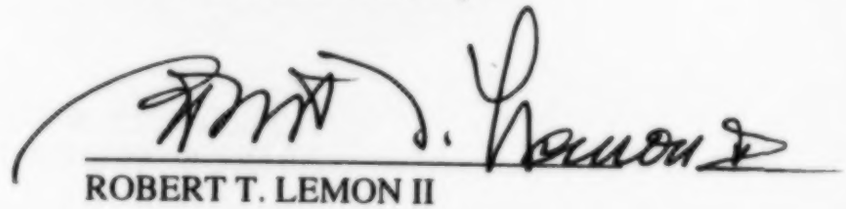
This Court should reverse the judgment of the Second Circuit Court of Appeals and remand the case with instructions to reinstate the jury verdict entered by the district court. However, at the same time, it would be extremely beneficial to all interested parties if the Court would expand further its previous opinion in McDermott International, Inc. v. Wilander, and furnish more comprehensive guidance regarding the appropriate legal test for defining the term "seaman" under the Jones Act. The present tests utilized within the federal and state court systems are totally insufficient to permit a proper and uniform determination of who is and who is not a Jones Act seaman. However, a comprehensive legal standard for determining "seaman" status under the Jones Act requires that the jury be instructed to consider the claimant's

alternative status under the LHWCA, otherwise, the distinction between "sea-based" workers and "land-based" workers inherent in the Jones Act and LHWCA becomes meaningless.

Respectfully submitted,



ROBERT B. ACOMB, JR.



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Amicus Curiae Brief have been forwarded to all counsel of record by depositing same in the United States mail, postage prepaid and properly addressed, this 30th day of November, 1994.

ROBERT B. ACOMB, JR.